

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, DECEMBER 1996 SESSION

FILED

February 27, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

HUBERT M. HURD,)	KNOX CHANCERY
)	
Plaintiff/Appellee)	
)	
v.)	HON. H. DAVID CATE,
)	CHANCELLOR
GENERAL SHALE PRODUCTS)	
CORPORATION and CNA)	
INSURANCE COMPANY,)	
)	
Defendants/Appellants)	NO. 03S01-9603-CH-00026

For the Appellants

Michael J. Mollenhour
P.O. Box 9799
Knoxville, TN 37940

For the Appellee:

J. Anthony Farmer
P.O. Box 709
Knoxville, TN 37901

MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Justice
Roger E. Thayer, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED.

THAYER, Special Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Defendants, General Shale Products Corporation and CNA Insurance Company, have appealed from the action of the trial court in awarding plaintiff, Hubert M. Hurd, 30% permanent partial disability benefits to the body as a whole.

The only issue on appeal is whether the evidence preponderates against the award of benefits.

Plaintiff Hurd was injured in the course and scope of his employment on August 20, 1990, while manually rolling up a truck cover. The equipment did not work properly, and plaintiff was pushing with his right arm when he tore a biceps tendon.

Plaintiff was 63 years of age at the time of the trial. He completed the 8th grade and later received a G.E.D. certificate. He had been employed by General Shale for 41 years and at the time of the accident was operating a dump truck. During his entire employment, he had worked at different positions such as a grinding machine operator, a brick machine operator, a fireman on the kiln, a forklift operator and a front-end loader operator.

He continued to work after the accident at the same job as his employer installed an electric motor on the vehicle which would roll up the truck cover and eliminate the manual operation. Although he has continued to work, he told the court he does not have the strength in his arm and shoulder as prior to this injury; he testified his grip in his arm is now weak and when he carries anything, it is hard to straighten his arm back out.

Dr. John Bell, an orthopaedic surgeon, treated plaintiff for his injuries. His testimony, which was by deposition, indicated plaintiff had sustained an injury to his arm and shoulder from the tear of the tendon and a neck injury where there was an aggravation of a previous condition due to degenerative changes. He

said surgery on the arm was not performed as it would not improve his strength. Treatment consisted of therapy and medication on a regular basis for some period of time.

The doctor gave plaintiff a medical impairment of 5% to the right arm and shoulder which converted to a 9% impairment to the body as a whole. He added a 3% impairment of the neck resulting in a total impairment of 12% to the whole body.

Prior to this accident, plaintiff had received a workers' compensation settlement of 45% to the body as a whole due to the development of an asthma condition. He testified the asthma did prevent him from doing strenuous physical work but it had no effect on his right arm and shoulder. He told the trial court that he had to avoid dusty work conditions, and the asthma problem was generally under control with the medication he was taking.

At the prior trial and the hearing before the Chancellor in the present case, plaintiff was questioned extensively concerning how each injury affected his work activity. He detailed numerous things he could not do because of the asthma condition. He also admitted he could not do many of the same activities because of his arm and shoulder injury. This testimony forms the basis of defendants' appeal as they insist there is no new or additional legal disability as a result of the second claim.

Our review of the case is *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance is otherwise. T.C.A. § 50-6-225(e)(2).

An employee has the burden of proving every element of the case, including causation and permanency by a preponderance of the evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987).

In fixing legal or vocational disability, anatomical disability ratings are only one of many factors to be considered. The real test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee considering his age, education, skills, training, local job

opportunities and capacity to work at types of employment available in claimant's disabled condition. *Orman v. Williams-Sonoma, Inc.*, 801 S.W.2d 672, 678 (Tenn. 1991).

In determining whether the employee's capacity to earn wages has been decreased, this is to be examined in relation to the open labor market and not whether the employee is able to return and perform the job held at the time of the injury. *Clark v. Nat'l Union Fire Ins. Co.*, 774 S.W.2d 586, 588 (Tenn. 1989).

It is true as insisted by defendants the employee was already limited in some activities by the prior workers' compensation claim due to the asthma condition. On the other hand, the claimant did detail limitations from the arm and shoulder injury which were new limitations on his work activity. To this extent, his claim for a new permanent injury and disability would be supported.

In considering his age, work experience, education and all of the other factors which must be examined, we cannot say the evidence preponderates against the award of benefits allowed by the Chancellor.

The judgment is affirmed. Costs of the appeal are taxed to the defendants jointly.

Roger E. Thayer, Special Judge

CONCUR:

E. Riley Anderson, Justice

Joe C. Loser, Jr., S
Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

HUBERT M. HURD,)	KNOX CHANCERY
)	No.110338-2
Plaintiff/Appellee,)	
)	
vs.)	Hon. H. David Cate
)	Chancellor
)	
)	
GENERAL SHALE PRODUCTS)	03S01-9603-CH-00026
CORPORATION and CNA)	
INSURANCE CO.)	
)	
Defendants/Appellants.)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved ; and

It is, therefore, ordered that the Panel's findings of act and conclusions of law are adopted and affirmed, and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the defendants jointly and their sureties, Lewis, King Krieg, Waldrop & Catron, for which execution may issue if necessary.

02/27/97

